In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1148

OMAR SCHMEUSSER, PETITIONER

v.

NICHOLAS DEB. KATZENBACH ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR RESPONDENTS IN OPPOSITION

On March 24, 1948, the Attorney General, acting pursuant to the Trading with the Enemy Act, 40 Stat. 411, as amended, 50 U.S.C. App. 1, *et seq.*, and executive orders promulgated thereunder, vested in himself certain property of Carl Anton Schmeusser, the father of petitioner. After filing with the Attorney General the necessary notice of claim, Carl Anton Schmeusser brought suit on February 2, 1949, in the District Court for the Western District of Oklahoma, to cancel the vesting order and to recover the property. Determining that Carl Anton Schmeusser was a resident of Germany from and after December

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1940, the district court ruled that he was an "enemy" as defined in Section 2 of the Act, 50 U.S.C. App. 2, and accordingly barred under Section 9(a), 50 U.S.C. App. 9(a). The court also held that he had become a citizen of Germany and was thus additionally barred from recovery by Section 39 of the Act, 50 U.S.C. App. 39. Judgment was entered for the government on July 30, 1951, and no appeal was taken.

On November 19, 1965, petitioner instituted this action, as successor in interest of his father, to vacate the prior judgment and to have judgment entered returning the property to him. He based his claim on the fact that his father had lost his United States citizenship (in 1947) under a statute (8 U.S.C. (1946 ed.) 804, now 8 U.S.C. 1484(a)) which was held unconstitutional in 1964 (see *Schneider* v. *Rusk*, 377 U.S. 163). The district court granted summary judgment for respondents.

The court of appeals affirmed (355 F. 2d 77), holding that, since Carl Anton Schmeusser was resident in Germany at a time when the United States was at war with Germany, he was an "enemy" under Section 2(a) of the Act and could not seek relief under Section 9(a) of the Act for the return of the property irrespective of his citizenship.

This holding is plainly correct. An unbroken line of decisions dating from World War I place it beyond dispute that one who is a resident of enemy territory is barred from recovery under the Act—

as, indeed, the statutory definition in Section 2 makes plain. See, *e.g.*, *Guessefeldt* v. *McGrath*, 342 U.S. 308; *United States* v. *Krepper*, 159 F. 2d 958 (C.A. 3), certiorari denied, 330 U.S. 824; *McGrath* v. *Zander*, 177 F. 2d 649 (C.A. D.C.); *Kahn* v. *Garvan*, 263 Fed. 909 (S.D. N.Y.). As stated in the *Krepper* case, 159 F. 2d at 966:

> In matters involving property rights of American citizens residing in a country at war with the United States, it has been consistently held that the term "individual resident" in a statute included as enemies individual residents within the territory of a nation with which the United States was at war and, therefore, applied to citizens of the United States as well as aliens under the provisions of "Trading with the Enemy Act", Section 2. * * *

It is therefore immaterial for purposes of the instant case whether petitioner's father be regarded as a German citizen or an American citizen. The fact of his enemy residence, established by the judg-

ment of the district court in 1951, is alone dispositive and there can accordingly be no basis for reopening.[1]

The petition should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

APRIL 1966.

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[1] We note parenthetically that insofar as the district court, in the father's original suit, ruled alternatively that the father was barred by his German citizenship, it was apparent as early as 1952—13 years before the instant suit was brought—that this aspect of its decision was erroneous. In the *Guessefeldt* case, *supra*, this Court decided that German citizenship would not bar one who was a nonresident of enemy territory.

Moreover, there are additional grounds for refusing to set aside the original judgment. Rule 60(b)(5), (6), F.R. Civ. P., upon which petitioner relies, is not ordinarily available to an applicant who has voluntarily abandoned his right to appeal. *Ackerman* v. *United States*, 340 U.S. 193; *Polites* v. *United States*, 364 U.S. 426, 431–432. Here, petitioner's father, who was represented by counsel, failed to take an appeal from the original judgment, and petitioner has not offered sufficient justification for that omission. See, *e.g.*, *Ackermann* v. *United States*, *supra*. In addition, the fourteen years which elapsed between the entry of the original decision and the institution of this case is a sufficient basis for not disturbing the judgment. See 7 Moore's *Federal Practice* (2d ed.), ¶ 60.27[3].

U.S. GOVERNMENT PRINTING OFFICE:1966